ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
Implementation of Section 301(j) of the Telecommunications Act of 1996	)	CS Docket No. 96-57
Aggregation of Equipment Costs by Cable Operators	)	

REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner") hereby respectfully submits these reply comments in response to the above-captioned Notice of Proposed Rulemaking released by the Federal Communications Commission ("FCC" or "Commission") on March 20, 1996.[1] Time Warner, a division of Time Warner Entertainment Company, L.P., owns and operates cable television systems across the nation. Furthermore, Time Warner has entered into a Social Contract with the FCC pursuant to which Time Warner has been permitted to engage in equipment and installation cost averaging.[2] Accordingly, Time Warner is directly interested in the proposals set forth in the NPRM and the comments submitted in response thereto as they might affect its cable television operations.

[1] Notice of Proposed Rulemaking, CS Docket No. 96-57, FCC 96-117, ____ FCC Rcd _____ (rel. March 20, 1996) ("NPRM").

[2] Memorandum Opinion and Order, FCC 95-478, ____ FCC Rcd _____ (rel. November 30, 1995); Erratum, DA 96-16, ____ FCC Rcd ____ (rel. January 17, 1996) ("Social Contract").

In implementing Section 301(j) of the 1996 Telecommunications Act, the Commission must be cognizant of the fact that the equipment aggregation provision was designed not only to reduce the burdens of rate regulation faced by cable operators but also to "promote the development of a broadband, two-way telecommunications infrastructure."[3] For these reasons, cable operators must be provided with the maximum amount of flexibility in deciding whether or not to aggregate, the appropriate geographic level of aggregation, and whether to choose aggregation for some but not all equipment within a particular broad category. Furthermore, because the HSC calculation is an integral component of calculating both installation and equipment costs, the Commission should allow cable operators to aggregate their equipment and installation costs in an identical matter.

Although the statutory provision precludes equipment used by subscribers taking only the basic level of service from being aggregated into broad categories with other equipment, the Commission should not allow this exception to negate the benefits of aggregation in the majority of circumstances. Subscribers taking only the basic level of service will often utilize the same equipment as is provided to other subscribers. This fact should not preclude cable operators from being able to aggregate such equipment within appropriate categories and on an appropriate geographic basis. The prohibition on aggregation should be applied only to equipment which is used exclusively by subscribers taking only the basic level of service and by no other subscribers. Even with respect to such equipment, no policy would be served by prohibiting cable operators from aggregating equipment used exclusively by basic-only subscribers on an appropriate franchise, system, regional or company basis.

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[3]Conference Report No. 104-458 ["Conference Report"], 104th Cong. 2d Sess. (1996) at p. 167.

Both regulatory certainty and administrative economy could be achieved by having the Commission, in the first instance, review Forms 1205 prepared by operators on an aggregated basis. Review of aggregated rates by the Commission will ensure uniformity of result and reduce the number of rate appeals that the Commission would have to ultimately adjudicate. Not only does the Commission have jurisdiction to review aggregated equipment rates, which includes equipment used to receive cable programming services, it has in fact employed its authority to review such aggregated equipment rates in the context of its Social Contract with Time Warner.[4]

The comments filed by the State of New Jersey, Division of the Ratepayer Advocate ("Ratepayer Advocate"), request the Commission to define various "levels of functionality" for specific equipment within the same broad category and limit the aggregation of costs to those elements of customer premises equipment that provide common functionality. The Ratepayer Advocate contends that if various types of equipment such as converters with different levels of functionality are categorized together, "the result will be that ratepayers who desire a low level of functionality (and perhaps a limited number of channels) may be subsidizing ratepayers obtaining a higher degree of functionality."[5] This position is clearly inconsistent with the 1996 Telecommunications Act and must be rejected.

Section 301(j) of the 1996 Telecommunications Act provides, in relevant part that:

> The Commission shall allow cable operators, pursuant to any rules promulgated under section (b)(3), to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category. Such aggregation shall not be permitted with respect to

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[4]Social Contract, supra, at ¶¶ 37-41.

[5]Ratepayer Advocate Comments at pp. 4-6.

> equipment used by subscribers who receive only a rate regulated basic service tier.[6]

The foregoing language could not be more clear. The Commission must allow cable operators to aggregate their costs on a franchise, system, regional, or company level for broad categories of equipment, and without regard to varying levels of functionality of the equipment within each such broad category. The statute specifically gives the example of converter boxes as the type of broad category which the Commission is required to establish. There is no legal foundation whatsoever to support the Ratepayer Advocate's argument that the costs of providing simple converters, converters having on-screen display capabilities, and addressable converters may not be aggregated into a single category because of their different levels of functionality. Given that the Ratepayer Advocate's position is in direct contradiction to the express language of the statute, it must be rejected in its entirety.

While it may be true that, in certain cases, allowing operators to aggregate their equipment costs into broad categories will result in some subscribers subsidizing the equipment utilized by other subscribers, this is true in any case where costs are averaged. For example, subscribers in higher density areas subsidize to some degree the costs of providing service to lower density areas. Indeed, they are required to do so by the Communications Act which requires that service rates be uniform within each franchise area where the cable operator is not subject to effective competition.[7] In any case, subsidization is not inherently bad and is often used as a tool to further legislative or regulatory initiatives. In this case, equipment aggregation was found by Congress to be a permissible means of promoting "the development of a

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[6]1996 Telecommunications Act, § 301(j), amending § 623(a) of the Communications Act, 47 U.S.C. § 543(a) (emphasis added).

[7]47 U.S.C. § 543(d).

broadband, two-way telecommunications infrastructure," by allowing the costs for more expensive equipment used to provide technologically advanced services to be blended in with lower cost, less sophisticated equipment thereby facilitating the deployment of new technology and infrastructure upgrades.[8] Furthermore, the Ratepayer Advocate's concern that subscribers desiring a very low level of functionality in their equipment would end up subsidizing the cost of more sophisticated equipment is expressly dealt with in the statute. Thus, the statute directs the Commission to exclude equipment used by subscribers taking only the basic level of cable service from the equipment aggregation provisions. While the Ratepayer Advocate may not agree with where Congress chose to draw the line in terms of preventing cross-subsidization, it is not free to ignore the statute, nor is the Commission.

For the same reasons, the Ratepayer Advocate's recommendation that aggregation be limited on a geographic basis to equipment provided by an operator within a single state must be rejected.[9] There is absolutely no indication that Congress intended to limit geographic aggregation within a single state and the fact that the statute expressly allows cable operators to aggregate their costs on a franchise, system, regional, or company level clearly indicates that no such limitation was intended. It is not uncommon for a single cable system located near the state boundary between two states to serve communities on both sides of the boundary. The Ratepayer Advocate's proposal would not allow the cable operator in such a circumstance to aggregate its costs even on a system level despite the fact that the statute directs the Commission to give operators that option. Similarly, it is not uncommon for larger cable operators, such as Time Warner, to manage their operations on a regional basis. In many cases, such regions

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[8]Conference Report, supra, at p. 167.

[9]Ratepayer Advocate Comments at pp. 6-7, 9-11.

comprise areas located in more than one state. The administrative efficiency and reduction in regulatory burdens which the aggregation provisions are designed, in part, to achieve, would not be realized if cable operators were limited to aggregating their rates within a single state even though their costs are incurred on a larger geographic basis. Furthermore, because most cable operators serve subscribers located in more than one state, adoption of a single state restriction on aggregation would preclude all but the smallest cable operators from aggregating their costs on a company level. Under no circumstances can a single state restriction on aggregation be squared with the statutory language allowing aggregation on a franchise, system, regional or company level.

The Ratepayer Advocate's only argument in support of a single state limitation on aggregation is the claim that such a scheme would be easy to administer in the State of New Jersey, which regulates cable systems on a state level. Even if such considerations were relevant to implementing the equipment aggregation provision of the statute, which they are not, state-wide regulation of cable is limited to only a small handful of jurisdictions. The local franchising authority in the overwhelming preponderance of cases continues to be local municipalities or other subdivisions of state government. Yet, one purpose of the statute was to make clear that operators must be permitted to aggregate their costs on a geographic area that may include more than a single regulator.[10] The difficulties cited by the Ratepayer Advocate in administering system, regional or company wide aggregation where more than one state is spanned are certainly no more burdensome than those faced by the typical local franchising authority in cases

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[10]The Commission itself noted that prior to enactment of the 1996 Telecommunications Act, some localities rejected aggregated region and company-wide costing proposals submitted by cable operators despite the fact that the FCC rules permitted operators to aggregate their costs at the franchise, system, regional or company level in a manner consistent with the accounting practices of the operator on April 3, 1993. NPRM at ¶ 4.

where costs are aggregated above the franchise level. Indeed, state regulators face even fewer obstacles in reviewing equipment rates than do local franchising authorities because they are often more experienced, better funded, and have the administrative machinery in place to undertake rate regulation. There is simply no basis to allow the benefits of the equipment aggregation provision to be negated by preventing cable operators from aggregating their equipment costs for operations that are located in more than a single state.

Although the Ratepayer Advocate recognizes that the FCC endorsed multi-state regionalized equipment rates pursuant to its Social Contract with Time Warner, the Ratepayer Advocate nonetheless argues that because the Social Contract has been judicially appealed, Time Warner should not be exempted from the rules adopted in this proceeding. This argument is simply wrong. Regardless of the outcome of any judicial appeal of the Social Contract, Section 301(j) of the Communications Act clearly requires the FCC to allow all cable operators to aggregate their equipment costs at geographic levels encompassing more than a single state. Furthermore, unless and until it is nullified on appeal, the Social Contract is a legally binding agreement between Time Warner and the Commission, which neither party is free to ignore. Indeed, the Social Contract specifically contemplated changes to the Commission's then-current rate regulations as a result of the passage of pending telecommunications legislation.[11] In the event of a material change in the Communications Act or the Commission's rules, any Time Warner system may elect not to be bound by the relevant provisions of the Social Contract involving basic rates, equipment rates, MPTs, and CPST rates.[12] Otherwise, the provisions of the Social Contract remain in force and any discrepancies between the Social Contract and

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[11]Social Contract at ¶ 84.

[12]Social Contract at ¶ 82 (emphasis supplied).

the Commission's rules with respect to equipment aggregation will be controlled by the general waiver granted pursuant to paragraphs 95 and 96 of the Social Contract.

The Ratepayer Advocate agrees with the Commission's observation that installation rates can and do vary to a greater extent than customer equipment rates and that installation rates may be influenced by factors specific to each geographic area.[13] This statement of support loses some of its credibility, however, given the fact that the Ratepayer Advocate in the very next sentence concedes that "this variation is perhaps not as significant in New Jersey as it could be in other states."[14] Furthermore, the Ratepayer Advocate admits that the State of New Jersey has allowed for installation charges to be aggregated at the same level as customer equipment charges,[15] which is precisely the regulatory approach that Time Warner and numerous other commenters urge the Commission to follow. The fact that variations in labor costs are not significant enough within the entire State of New Jersey to have required different treatment of installation and other equipment costs for aggregation purposes lends further support for Time Warner's belief that local variations in labor costs are simply not significant enough to generally warrant such differential treatment.

As a final matter, while advancing no proposals of its own to streamline the rate review process, the Ratepayer Advocate objects to any FCC proposal which would remove the authority of states and localities to review subscriber rates based on aggregated cost data.[16] Such a position is at best non-responsive to the concerns raised by the Commission. In its NPRM, the

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[13]Ratepayer Advocate Comments at p. 8.

[14]Id. at pp. 8-9.

[15]Id. at p. 9.

[16]Id. at pp. 10-11.

Commission recognized that review of aggregated equipment data by each local franchising authority could lead to potentially inconsistent orders regarding that data and specifically sought comment on the availability of administratively efficient alternatives.[17] The most effective way to prevent inconsistent local decisions and minimize appeals would have the Commission, in the first instance, review all cable operators' FCC forms that have been prepared on an aggregated basis. Centralized review by the Commission would ensure consistency of result and promote administrative efficiency.

Furthermore, such an approach is not novel. This is precisely the approach taken by the Commission in its Social Contract with Time Warner. Pursuant to Section III.B. of the Social Contract, the Commission reviews Time Warner's aggregated equipment rates on an annual basis. However, such aggregated equipment and installation charges, as Time Warner establishes and the Commission approves under the Social Contract, remain subject to enforcement by local franchising authorities who may order refunds of any excess charges as is necessary to comply with the equipment and installation charges permitted by the Commission.[18] The Commission expressly found that such an arrangement was "consistent with the 1992 Cable Act's directive that the Commission establish standards by which local franchising authorities establish rates for installation and equipment used to receive basic service."[19] Accordingly, there is no reason why the Commission cannot follow this same approach in reviewing aggregated equipment rates for all operators generally in the first instance and should in fact do so.

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[17]NPRM at ¶ 14.

[18]Social Contract at ¶ 37.

[19]Social Contract at ¶ 41.

Based on the foregoing, Time Warner respectfully requests that the Commission reject the suggestions by the Ratepayer Advocate that would require categorization of equipment based on the level of functionality of each particular type of equipment; that would limit equipment aggregations to a geographic area no larger than a single state; that would require installation costs to be treated differently than other equipment costs for aggregation purposes; and that would allow states and local authorities to continue to review aggregated equipment rates in the first instance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Glenda V. Thompson, a secretary at the law firm of Fleischman and Walsh, L.L.P. hereby certify that a copy of the foregoing "Reply Comments of Time Warner Cable" was served this 22nd day of April, 1996, via first-class mail, postage pre-paid, except where indicated below as having been served by hand, upon the following:

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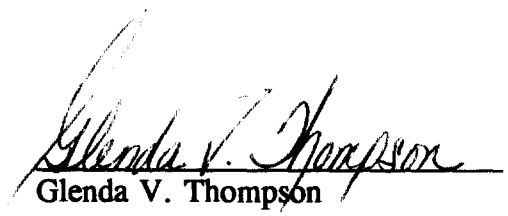

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